United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

To be argued by
MITCHEL B. CRANER

74-1948

ORIGINAL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOSEPH W. HALEY and HENRY WHITNEY, as Trustees of the International Association of Bridge, Structural and Ornamental Iron Workers, Local 417 Training and Education Fund,

Plaintiffs-Appellants,

-against-

ROBERT PALATNIK and JOSEPH ALBENDA, Trustees of the International Association of Bridge, Structural and Ornamental Iron Workers, Local 417 Training and Education Fund,

-and-

WILLIS C. ROSE, individually,

Defendants-Appellees.

ON APPEAL FROM THE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF of DEFENDANT-APPELLEE PALATNIK

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INTRODUCTION

This is an appeal brought, by Plaintiffs-Appellants Joseph W. Haley and Henry Whitney, as Trustees of the International Association of Bridge, Structural and Ornamental Iron Workers Local 417, Training and Education Fund (herein Fund), from the dismissal of an action, pursuant to Section 302(c)(6) of the Labor Management Relations Act, 29 U.S.C. Section 186(c)(6) and 28 U.S.C. Section 2201 for a declaratory judgment, and injunctive relief.

Plaintiffs-Appellants had, in the court below, sought a declaration of the rights, duties and responsibilities of the trustees of this jointly administered labor-management Fund. Specifically, plaintiffs-Appellants claimed that Defendant-Appellee Rose's contract of employment with the Fund violated § 302(a) and (b) of the Labor Management Relations Act because (1) Rose caused himself to be hired as Fund Administrator, in violation of his fiduciary duty as trustee to the Fund's beneficiaries, (2) the contract was not approved in accordance with the provisions of the trust instrument establishing the trust, and (3) the payments made to Rose under the contract represent illegal payments of money by an employer to a representative of its employees.

In its opinion, the trial court held that Plaintiffs-Appellants' claims that Rose violated his fiduciary duty to the trust beneficiaries and that the Rose's employment contract was

not approved by the trustees in accordance with the terms of the trust instrument did not state valid claims under Section 302, and the court could not consider them *(Appendix 59). Plaintiffs-Appellants have accepted this decision (Appellants' Brief p. 11) and have elected not to appeal these aspects of the action. The only issues before this court relate to alleged illegal payments to Rose by an employer representative and to the trial court's findings of fact.

ISSUES

The issues that appellants' have elected to litigate are:

1. DO THE PAYMENTS MADE TO ROSE AS ADMINISTRATOR OF THE FUND PURSUANT TO HIS EMPLOYMENT CONTRACT WITH THE FUND REPRESENT ILLEGAL PAYMENTS OF MONEY BY AN EMPLOYER TO A REPRESENTATIVE OF ITS EMPLOYEES, IN VIOLATION OF L M RA § 302?

2. SHOULD THE TRIAL COURT'S FINDINGS OF FACT BE SET ASIDE AS CLEARLY ERRONEOUS?

STATEMENT OF THE CASE

In 1967, after execution of collective bargaining agreements the within jointly administered training and Education Fund was created (A 85 Trial Transcript 11)* There is no question that the Fund was established in accordance with

*(Herein cited Appendix = A)
*(Herein cited Trial Transcript = T.T.)

Section 302 (A 52), and that Union and employers are each represented by two of the four Fund Trustees (A 20).

Defendant-Appellee, Rose, was, until July 1, 1973, the elected president of the Union, an office he had held since 1963 (A 138 T.T. 64) Rose was also chairman of the Joint Apprenticeship Committee and Trustee of the within Fund. (A 137 T.T. 63). At the June 30, 1973 membership meeting, Rose was defeated by plaintiff-appellant Haley in the election for Union president. (A 101 T.T.27) Rose was not reappointed as trustee for any of the trust funds. On July 2, 1973, Rose became the full-time paid Administrator of the Fund pursuant to a five year employment contract signed on May 29, 1973 (A 133 T.T. 59).

The subject of retaining a full-time Administrator for the Fund had been discussed by Rose and predecessors of the defendant-appellee employer trustees as early as 1970 (A 133 T.T. 59). At the time, it was not necessary to hire an Administrator, because the Fund was not yet large enough to sustain one (A 134 T.T. 60). In March, 1974, defendant-appellee Albenda, an employer trustee again raised the subject of retaining a full-time administrator (A 135 T.T. 61).

In May 1974, Rose visited the Fund's attorney, Mr. O'Hara, and O'Hara drew up a contract retaining Rose as Fund Administrator. Rose and O'Hara discussed the contract's terms, including compensation, which Rose suggested should be foremen's wages. The document prepared by O'Hara as a result of this meeting, with some modification, was presented

to and signed by the other trustees including defendant-appellee Robert Palatnik (A 38, 42, 44, 59, 77, 78 T.T. 112, 116, 118, 133, 151, 152).

Rose made no threats or promises to either of the employer trustees to induce them to sign the contract (A 136 T.T. 62), and they made no demands or expected anything in return for their signatures (A 67).

The complaint does not allege, nor does any witness testify that defendant-appellee Palatnik did anything wrong, and made no demands nor expected anything directly or indirectly, in return for signing as trustee. Palatnik is, in fact, only peripherally mentioned in the hearings.

POINT I

ANY PAYMENTS MADE TO ROSE AS ADMINISTRATOR OF THE FUND, PURSUANT TO HIS EMPLOYMENT CONTRACT WITH THE FUND, DO NOT REPRESENT ILLEGAL PAYMENTS OF MONEY BY AN EMPLOYER TO A REPRESENTATIVE OF ITS EMPLOYEES IN ACCORDANCE WITH THE PROVISIONS OF LABOR MANAGEMENT RELATIONS ACT SECTION 302

Plaintiffs-Appellants, in their complaint, alleged that defendant-appellee, Rose, abused his position as President of the union and trustee of the Fund so as to induce the other Fund Trustees to consent to his being hired as Fund Administrator. The employer trustees, defendants-appellees', Palatnik and Albenda, were alleged to have conspired with Rose to retain

him as Fund Administrator in order to benefit the faction in the union power struggle they allegedly considered most favorable to management. Appellants contended that this conduct violated Labor Management Relations Act Section 302 as a scheme to divert trust Funds to Rose, in violation of the Act which prohibits payments by an employer to an employee representative. Plaintiffs-Appellants sought a declaratory judgment, pursuant to 28 U.S.C. § 2201, declaring void Rose's employment contract with the Fund as well as injunctive relief pursuant to LMRA § 302 (e).

Section 302 of the Labor Management Relations Act provides in pertinent part:

> (a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value--
> (1) to any representative of any of his employees who are employed in an industry affecting commerce; or
> (2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or which admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or
> (3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a).

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in part II of the Interstate Commerce Act) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: PROVIDED, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

Further, the section has detailed requirements relating to a Fund's objectives and administration.

Thus Section 302 requires that Trust Funds have the following objectives in order to be exempt from the restrictions on employer payments to unions: (1) The Fund must be for the sole and exclusive benefit of the employees of the contributing employer and their families or dependents; or (2) the Fund must be for the sole and exclusive benefit of such employees jointly with the

employees of other employers making similar payments, and their families or dependents; (3) the Fund must be of the type enumerated in the section. The 1959 amendments permit apprenticeship or other training programs, like the one involved herein.

The Act will be violated unless the Fund is Administered as follows: (1) the detailed basis on which payments are to be made must be specified in a written agreement with the employer; (2) Employers and employees must be equally represented in the Administration, together with such neutral persons as the employer and the employee representatives may agree upon; (3) the agreement must provide, in case of a deadlock, that either the two groups shall agree on an impartial umpire or that the United States District Court where the Trust Fund has its principal office shall appoint one; (4) the agreement must also provide for an annual audit of the Trust Fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the Trust Fund and at such other places as may be designated in the agreement.

"There was no question that the Fund was established in accordance with the provisions of the Act. The Union and the employers are each represented by two of the four Fund Trustees." (Opinion of Lloyd F. Mac Mahon, U.S.D.J. A 52-53).

The only question before the court was whether payments to Rose were illegal, pursuant to the provisions of LMRA § 302.

It is clear that not every breach of trust or fiduciary duty is a violation of Section 302. The Congress intended only to eliminate corruption, bribery or extortion in the collective bargaining process. Thus in Arroyo vs. U.S. 359 U.S. 419 (1965), the majority reversed the conviction of a union official who misappropriated an employer payment to a Welfare Fund. The Court held that misappropriation of fund monies was not a violation of Section 302. The court stated:

> "The provision [Section 302] was enacted as part of a comprehensive revision of Federal Labor Policy in the light of experience acquired during the years following passage of the Wagner Act and was aimed at practices which Congress considered inimical to the integrity of the collective bargaining process.
>
> * * *
>
> Those members of Congress who supported the amendment were concerned with corruption of collective bargaining through bribery of employee representatives by employers, with extortion by employee representatives, and with the possible abuse by union officers of the power which they might achieve if Welfare Funds were left to their sole discretion."

Congressional intent was recently reinforced in its 1969 amendments to § 302, which permitted employer-supported

trust funds to be established for scholarships and child care center. The House Report states:

> "Section 302 of the Labor-Management Relations Act prohibits payments by employers of money or other things of value to employee representatives. This broad prohibition was enacted to prevent bribery, extortion, shakedowns, and other corrupt practices, and to protect the beneficiaries of lawful employer-supported funds." H.R. Rep No 91-286, 91st Cong. 1st Sess., U.S. Code Cong. & Admin. News (1969) pp 1159-1160.

The section does not require "mutuality of guilt." Thus an employer might violate Section 302(a) if he paid money to a representative of employees even though the latter had no intention of accepting. A representative might violate Section 302(b) if he coerced payments from an innocent and unwilling employer. Both would violate the Act if the payment were obstensibly made for one of the lawful purposes specified in § 302(c) if both knew that such a purpose was merely a sham. Arroyo supra.

In essence this is what plaintiffs-appellants contend, to wit, that both parties knew that the payments to Rose were a sham and thus violated the act.

During the course of the trial, Rose was asked:

> "In order to secure this appointment, did you make any promise or any threat to use any method of coercion against anybody with

respect to the obtaining of this job?"

to which he replied

"No, I did not." (A. 136 T.T. 62)

This was not rebutted. Further, no evidence was introduced, tending to prove that the employer trustees, expected to obtain any benefit from Rose in return for signing the contract. In fact, defendant-appellee Palatnik is mentioned at the trial only in passing; Without either of these elements, Section 302 is not violated.

The District Judge, based on the uncontradicted evidence, found that:

> There is no evidence, however, which shows that Rose, Mims, Albenda or Palatnik attempted to use the structure of the Fund to disguise or facilitate direct or indirect employer payments to Rose. All payments of money to Rose, as Administrator, were to be made out of Fund monies, and the evidence contains no suggestion that any payments were made by any employer to Rose at any time. Although it is true that the money Rose receives as Fund Administrator was originally contributed to the Fund by employers, there is no indication that Rose's salary was paid out of money specially earmarked for that purpose, rather that out of general Fund monies.
>
> * * *
>
> There was no evidence that the kind of bribery and extortion congress sought to prevent when it passed the Act was present here. The evidence does not show that Rose, the prime mover in acquiring the administrator's job for himself, made any threats or promises to either of the employer trustees to induce them to sign the contract, or that they

demand or expected anything in return for their signatures. (A. 66-67)

Under these circumstances, it is clear that there is no evidence to support any violation of LMRA § 302, despite the fact that such a violation is claimed in the complaint, and the dismissal of the complaint must therefore be sustained.

POINT II

THE TRIAL COURT'S FINDINGS OF FACT SHOULD NOT BE SET ASIDE

Plaintiffs-Appellants, implicitly, argue that the court below's Findings of Fact are erroneous (Appellant's brief p. 10). No evidence is given to support their position, however.

Federal Rules of Civil Procedure, Rule 52(a) provides in pertinent part that: "Findings of Fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses". Thus this Court's scope of review is limited to whether the District Court's Findings of Fact are clearly erroneous. If they are not the decision must stand.

It has long been held that such findings are presumptively correct, Fleming vs. Palmer 123 F. 2d 749 (1st Cir. 1942), cert den. 316 U.S. 662; 62 S. Ct. 942,

86 L. Ed. 1739, and the burden is on the appellant to persuade the reviewing court that the finding was clearly erroneous. Watson vs. Joshua Hendy Corp. 245 F. 2d. 463 (2nd Cir. 1957).

In U.S. vs. U.S. Gypsum Co., 333 U.S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 746 (1948) the definitive test in reviewing findings was stated by the Court to be: "a finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

The Appellate Court, in reviewing findings, does not consider and weigh the evidence de novo. Zenith Radio Corp. vs. Hazeltine Research Inc. 395 U.S. 100, 123, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969). The mere fact that on the same evidence the Appellate Court might have reached a different result does not justify it in setting the findings aside. St. Louis Typographical Union vs. Herald Co. 402 F. 2d 553 (8th Cir. 1968) Ruby vs. American Airlines 329 F. 2d 11 (2nd Cir. 1964) vacated as moot 381 U.S. 277, 85 S. Ct. 1456, 14 L. Ed. 2nd 430 (1963). It may regard a finding as clearly erroneous only if the finding is without adequate evidentiary support or induced by an erroneous view of the law. Whitson vs. Yaffee Iron & Metal Corp. 385 F. 2d 168, 169 (8th Cir. 1967).

The Rule further limits the scope of appellate review by requiring that due regard be given to the opportunity of the trial court to judge the credibility of the witnesses. Appellate courts are especially reluctant to set aside a finding based on the trial judge's evaluation of conflicting oral testimony. St. Louis Typographical Union supra, and will do so only under the most unusual circumstances. Zenith Radio Corp. supra.

Judge Medina, writing for the majority in Ruby, supra, has stated this rule, thus:

> "So, at the outset we state the rule to be, especially in this case where the testimonial evidence is conflicting and the trial judge saw and heard the witnesses as they gave their testimony, that a finding of fact by a District Judge in a non-jury case must stand if there is substantial evidence to support it; and it must be assumed that conflicting testimony was rejected and that documents or parts thereof depending on the veracity of the witnesses giving such conflicting testimony were found to be unreliable, even if the trial judge does not make an endless series of detailed statements to the effect that he does not credit the testimony of each witness."

The trial court found:

> "There is no evidence, however, which shows that Rose, Mims, Albenda or Palatnik attempted to use the structure of the fund to disguise or facilitate direct or indirect employer payments to Rose....there is no indication that Rose's salary was paid out of money specifically earmarked for that purpose, than out of general Fund monies....the evidence does not show that Rose, the prime mover in acquiring the administrator's job for himself,

made any threats or promises to either of the employer trustees to induce them to sign the contract, or that they demanded or expected anything in return for their signatures...." (A. 66-67)

Appellant has made no showing that these Findings are clearly erroneous. Without such a showing, this Court must accept the Facts as found by the District Court.

CONCLUSION

Plaintiffs-Appellants instituted the wrong action, if they in fact had a right of action, in the wrong court. At best, the facts, presented by plaintiffs-appellants suggest that, perhaps, they had a proper claim for relief for a breach of fiduciary obligation on the part of the trustee pursuant to the prevailing law of the State of New York. As set forth by the court below such a claim for relief could not be properly entertained by a United States District Court unless plaintiffs-appellants had alleged a claim for relief under state law pendent to their Federal claims. Plaintiffs-appellants failed to do this as indicated in Lloyd F. Mac Mahon United States District Judge's decision in which he properly stated that plaintiffs have not seen fit to join any of their state claims in this action or to amend their complaint to do so and the complaint must therefore be dismissed.

In this court, plaintiffs-appellants seek to obtain the same relief indirectly, which they couldn't get directly

in the court below. There is no evidence to support any violation of LMRA § 302. Without such a violation, their complaint fails to state a claim for relief and the dismissal of the complaint must therefore be sustained.

Respectfully submitted,

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By: Mitchel B. Craner
MITCHEL B. CRANER

Dated: New York, New York
October 31, 1974

On the Brief
STEPHEN E. KLAUSNER

SERVICE OF 2 COPIES OF THE WITHIN

Appellee's Brief

IS HEREBY ADMITTED.

DATED: November 6, 1974

John R. Hasbrouck, Jr. Esq.

Attorney for

STATE OF NEW YORK
COUNTY OF NEW YORK

BERT MYERS being duly sworn deposes and says: On November 5th, 1974 I served the within ~~record on appeal~~ brief ~~appendix~~ on John M. Donoghue the attorney for ~~the respondent~~ Joseph Alvenda by ~~leaving~~ mailing ~~three~~ copies thereof ~~at~~ his office located at 54 Market Street Poughkeepsie, N.Y. 12601

Bert Myers

Sworn to before me this 5th day of November 1974

Theresa Corless

THERESA CORLESS
Notary Public, State of New York
No. 4518917
Qualified in Bronx County
Term Expires March 30, 1976

STATE OF NEW YORK
COUNTY OF NEW YORK

BERT MYERS being duly sworn deposes and says: On November 5th, 1974 I served the within ~~record on appeal~~ brief ~~appendix~~ on Frank Parsons Silverman Nowicki the attorney for ~~the respondent~~ Wallis C. Rose by ~~leaving~~ mailing ~~three~~ copies thereof ~~at~~ his office located at 120 North Main Street New City, N.Y. 10956

Bert Myers

Sworn to before me this 5th day of November 1974

Theresa Corless

THERESA CORLESS
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Term Expires March 30, 1976